

ISSUES

What is the nature and extent of claimant's injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds that the Award of the Administrative Law Judge should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts the findings and conclusions contained in the Award as its own.

The Administrative Law Judge determined that claimant had a 2 percent impairment of function to the body as a whole for the injuries suffered on July 30, 2001, to her neck and upper back. This determination was made after reviewing the records of occupational medicine specialist Mark S. Dobyns, M.D., claimant's treating physician; Robert L. Eyster, M.D., board certified orthopedic surgeon; Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation; and Philip R. Mills, M.D., board certified in physical medicine and rehabilitation.

Dr. Dobyns, the treater, determined claimant had no permanent impairment, while Dr. Eyster and Dr. Mills each determined claimant had a 2 percent impairment, with Dr. Murati opining claimant suffered a 5 percent impairment, all to the body as a whole for injuries suffered to her neck and upper back.

The Administrative Law Judge found Dr. Eyster's opinion to be the most credible due to the fact that Dr. Eyster and Dr. Dobyns were the only physicians who had the opportunity to examine claimant prior to a second injury suffered on December 17, 2001, which claimant settled in a separate workers' compensation action. While Dr. Mills and Dr. Murati provided opinions as to claimant's functional impairment, neither had the opportunity to evaluate claimant prior to this second injury, thereby making their examinations more difficult and calling into question their opinions.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.²

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is

² See K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

not bound by medical evidence presented in the case and has the responsibility of making its own determination.³

In this instance, the Board finds, as did the Administrative Law Judge, that Dr. Eyster's opinion that claimant has a 2 percent impairment to the body as a whole for the injuries suffered on July 30, 2001, is the most credible in determining claimant's impairment from the July 30, 2001 accidental injury. Therefore, the Award of the Administrative Law Judge is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated March 6, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Gary K. Albin, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Director

³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).